

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation into circumstances under which an)	
electric company must seek Department approval)	Docket D.T.E. 04-92
pursuant to M.G.L. c. 164, § 72 prior to)	
transmission line construction or alteration)	

COMMENTS OF
MASSACHUSETTS ELECTRIC COMPANY,
NANTUCKET ELECTRIC COMPANY AND
NEW ENGLAND POWER COMPANY

Introduction

These comments by Massachusetts Electric Company (“MECo”), Nantucket Electric Company (“Nantucket”) and New England Power Company (“NEP”), (together, “the National Grid companies”) respond to the Department’s Notice of Inquiry in the above proceeding. Both MECo and Nantucket are distribution companies as defined in M.G.L. c. 164 § 1. Together, they serve approximately 1.2 million retail customers in 172 communities in the Commonwealth. As such, they are subject to the complete jurisdiction of the Department. NEP is a transmission company, as defined by M.G.L. c. 164 § 1, and is the wholesale transmission provider within the National Grid USA organization, serving, in Massachusetts, 30 municipal light departments as well as its affiliates MECo and Nantucket. Although NEP is subject to the authority of the Federal Energy Regulatory Commission (“FERC”) for ratemaking purposes, it is subject to the Department and/or the Energy Facilities Siting Board (“EFSB”) for some siting and permitting purposes within the Commonwealth.

The National Grid companies appreciate and welcome the opportunity to participate in this proceeding to create a measure of legal certainty for those who are planning, permitting and building transmission facilities. With a long history of seeking Department approvals under Section 72, the National Grid companies are currently embarked on significant system-wide improvements that could be affected by the outcome of this proceeding.

We endorse the development of guidelines by the Department to govern the use of Section 72 to promote the efficient use of the Department's resources as well as the resources of the regulated community. For system planning purposes and to ensure that projects will be completed in a timely manner for the benefit of customers, it is of utmost importance that the requirements and length of a project's overall permitting process be understandable and predictable. To underscore the significance of regulatory approvals for transmission projects, NEP has recently adopted an internal policy requiring a permitting strategy and timeline for each project before it can receive final financial approval.

With regard to new linear projects, we specifically propose that the Department (1) rely on the Chapter 164, Section 1 definition of "transmission" in its application of Section 72 to projects that do not involve eminent domain and (2) be guided by the Sudbury¹ and BECo² decisions and so permit proponents of *all* linear projects involving eminent domain to seek Section 72 approval. As for upgrade projects such as reconductorings, replacements and other alterations that may be subject to Section 72 review, the National Grid companies propose that the ambiguous "substantial"

¹ Town of Sudbury v. Dept. of Public Utilities, 343 Mass. 428 (1962).

² Boston Edison Co. v. Town of Sudbury, 256 Mass. 406 (1969).

improvements at issue in the BECo decision be defined as those with more than a 20% change in structure height or width. Finally, we propose a starting point for defining “routine maintenance” projects that should not require Section 72 review.

I. Nature of Transmission Lines Subject to Section 72

Section 72 provides for the review of “a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it...”

1. Does this language encompass all types of transmission lines that a transmission provider might construct, or are certain types of lines (for example, substation tap lines) excluded from this definition?

The quoted language appears to contemplate the two-step delivery system for power – i.e., bulk transmission service and distribution-level service – but it is not all-inclusive. Although broad in scope, the language does not expressly include tap lines that merely interconnect a transmission line to a substation that steps power down. Such lines do not clearly fall within the definition of transmission lines contemplated by Section 72.

2. Section 72 appears to distinguish between “a line for the transmission of electricity” and other electric lines. Are the Department’s two orders distinguishing transmission and distribution facilities in response to FERC Order 888 (Classification of Transmission and Distribution Facilities, D.T.E. 97-93 (1998), and

Western Massachusetts Electric Company, D.T.E. 03-71 (2004)) relevant to the question of which electric lines are subject to Section 72?

Yes. Although FERC Order 888 and the Department's two orders were issued for jurisdictional ratemaking purposes, they are relevant to the issue at hand. As they are articulated in Order 888, the guidelines for distinguishing transmission and distribution facilities could also be used to differentiate between those lines subject to Section 72 and those that are not. The National Grid companies' facilities in Massachusetts fall fairly neatly into the two categorical definitions, with NEP owning primarily 69 kV and higher bulk transmission lines and with MECo and Nantucket owning lower voltage lines for distribution service to retail customers. However, since the seven-factor test has produced different results for each unique utility system within the state, the ability of Order 888 and the Department's related orders to produce a consistent approach to Section 72's applicability is doubtful.³

Can you propose a clear formula that would distinguish transmission lines subject to Section 72 from distribution lines that would not be subject to Section 72?

Yes. NEP proposes that the definition of "transmission" contained in M.G.L. c. 164 § 1, "the delivery of power over lines that operate at a voltage level typically equal to or greater than 69,000 volts from generating facilities across interconnected high voltage lines to where it enters a distribution system", should define the lines that are subject to Section 72 review. Although the Section 1 definitions of "transmission" and "distribution" were adopted by the legislature in 1997 as part of the restructuring amendments to Chapter 164, and are an overlay on Section 72, this approach to

³ We note, in addition, that those entities "providing or seeking to provide transmission service" that have only become subject to Section 72 since October 31, 2004 have not undergone a seven-factor test.

determining the applicability of Section 72 provides a bright-line test for the Department and the regulated community.

3. From a policy perspective, are there voltage, length, or other considerations that should dictate when a Section 72 filing is required?

Yes. If the Department is seeking consistency in the regulated community's applications for Section 72 approvals, then clear-cut, well-defined criteria are needed to define those linear projects that are subject to review. As stated earlier, voltage levels can provide a bright-line test for determining the applicability of Section 72. Line length could also be a determinative factor in whether or not a Section 72 proceeding is mandatory. In this regard, the Department could use its considerable discretion to craft a rule of reason to except lines at or below a stated length from Section 72 review.

In another vein, given the serious and fundamental constitutional issues associated with a taking of private property, the National Grid companies urge the Department to permit regulated entities to seek Section 72 review of *all* linear projects which require the exercise of eminent domain powers. Indeed, according to the constitutions of both the federal⁴ and state⁵ governments, a public use or benefit is one of the underpinnings that must be proved prior to any taking of private property. The Sudbury and BEC cases mandate such a proceeding for transmission lines and indicate Section 72's applicability

⁴ U.S. CONST. amend. V states in pertinent part, "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

⁵ MA. CONST. pt. I, art. X makes more mention of the public benefit, stating in pertinent part, "[N]o part of the property of any individual can, with justice, be taken from him, or applied to the public uses, without his own consent, or that of the representative body of the people ... And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

to distribution lines.⁶ Accordingly, we urge the Department to permit Section 72 applications for a finding of “public convenience” and “public interest” as a condition precedent to a taking for all types of lines.

4. Could the Department exempt certain types or lengths of electric transmission lines from Section 72 review, while retaining the ability to authorize the taking of property by eminent domain for a certain line of that type or length, if necessary?

Yes. The Department could exempt certain defined categories of lines from Section 72 review yet still retain the authority to grant a petition for eminent domain for those exempt categories. This is what we advocate.

Notwithstanding our proposal that the Department distinguish Chapter 164, Section 1’s “transmission” and “distribution” lines for purposes of Section 72’s applicability to new lines, we respectfully suggest that the Department permit companies in need of eminent domain for distribution lines to petition for a finding of public convenience and public interest under Section 72.⁷ The constitutional underpinnings of a taking only permit such an action if a public benefit is at the heart of a project. Accordingly, we believe that the Department’s finding of “public convenience” and “public interest” is a condition precedent to its Section 79 order authorizing a taking.

5A. For transmission providers: What factors do you consider when deciding whether to seek Section 72 approval for a new transmission line?

⁶ See BEC at 410. There is nothing in SJC’s reference to “transmission and distribution lines” that should be read as *excluding* facilities such as tap lines that may require a taking.

⁷ We similarly propose that the Department permit a Section 72 petition if condemnation is necessary for the siting of a tap line, although that circumstance may be rare.

Given the basic characteristics of its linear network (i.e., 69 kV and higher), NEP has consistently sought Section 72 approval for new transmission lines that move bulk power. However, as for tap lines, NEP would take the same approach as its retail affiliate MECo did in a recent zoning exemption docket for the Westford #57 substation: MECo did not seek a separate Section 72 approval for the substation's associated tap line, but rather relied on the Department's finding of "substantial public interest" in the substation project under Chapter 40A Section 3 as sufficient for allowing construction of the tap line.⁸ Similarly, NEP more recently relied on a local zoning permit for its Woodchuck Hill #56 substation project as inclusive of the associated tap line, rather than bringing a separate Section 72 case for the tap line alone.⁹

Have these factors changed over time, or have you historically relied on these factors in deciding whether to seek Section 72 approval of new transmission projects?

Prior to the BECo and Sudbury decisions, the predecessors to the National Grid companies did not necessarily seek Section 72 approval prior to constructing all new transmission lines. Until 1962, at least one predecessor, based upon its understanding of legislative history and intent, sought Section 72 approval only if condemnation was involved. According to company records, the DPU was aware of this practice through reports and various other proceedings in which the company sought amendment of terms imposed by local authorities. Additionally, that company construed Section 72 as

⁸ Massachusetts Electric Company, D.T.E. 01-77 (2002). Please note that this docket did *not* involve a taking of private property.

⁹ The tap line was included in the plans submitted to the Town of North Andover Zoning Board of Appeals, which administers the Zoning Bylaw for "the health, safety, convenience", *et cetera* of the Town. See Zoning Bylaw, Town of North Andover, 1972 (amended May 2000), Section 1 and Section 2.65.

applying only to transmission lines as distinguished from distribution lines, as those terms were understood at the time.

5B. For transmission providers: What voltage levels are used in your service territory:

(a) for the transmission of electricity for distribution in some definite area;

NEP uses 69 and 115 kV AC lines for these purposes in Massachusetts. Note that NEP does use some minor 23 kV facilities in Massachusetts for substation-to-substation purposes.

(b) for supplying electricity to yourself or to another electric company or to a municipal lighting plan for distribution and sale;

In Massachusetts, NEP uses 69, 115, 230 and 345kV AC lines and 450 kV DC lines for these purposes. Note that NEP also uses some minor 23 kV lines in the Merrimac Valley and some 6.9 kV and 2.4 kV lines in western Massachusetts for these purposes.

(c) for transmission of electricity to a railroad, street railway or electric railroad, for the purposes of operating it?

NEP does not provide transmission service to any such entities.

Are there instances in which any of the same voltage levels also are used for lines in your service territory that are clearly distribution circuits only?

No. NEP does not use its limited 23 kV facilities to provide distribution service.

6. For transmission providers with recent experience in Section 72 reviews: Please provide an estimate of the incremental expenses incurred when a transmission project requires a Section 72 review.

NEP, the transmission provider, has not sought a Section 72 approval during the past three years.

However, the very recent experiences of MECo and Nantucket can shed some light on incremental costs associated with a Section 72 proceeding. For its new 2319 line in Georgetown and Groveland, neither of which is within MECo's franchise, MECo sought Section 72 approval¹⁰ for the 1.8-mile long, 23kV line on private right-of-way. MECo's expenses related to the Section 72 proceeding totaled some \$90,000, or 20% of overall project costs. This included the costs of developing all DTE-related materials, conducting a site visit, a local public hearing and one day of evidentiary hearings, relevant engineering and environmental consulting fees, in-house legal fees, and overhead expenses. Nantucket's expenses for the same services associated with its Section 72 proceeding¹¹, are estimated to be \$187,000, twice the cost, but a much smaller percentage of projected project costs than the 2319 line project. It is clear from these comparisons that for small projects, a Section 72 proceeding can impose recognizable financial impacts.

II. Transmission Lines with Altered Construction

Section 72 states, in part, that “[a]ny electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the [D]epartment for authority to...continue to use as constructed or with altered construction a line for the transmission of electricity...”

¹⁰ Massachusetts Electric Company, D.T.E. 03-130 (2004). Grants of location for street crossings were also obtained from the two towns.

¹¹ Nantucket Electric Company, D.T.E. 04-10. The Department has not yet issued an order in this docket.

1. Should this language be read as requiring companies to seek Section 72 approval for alterations to certain transmission lines, where eminent domain is not required for such alterations?

Yes. The BECo decision requires Section 72 approval for alterations to certain transmission lines even where eminent domain is not required. However, that decision leaves open the question of which kinds of alterations are so “substantial” as to require Section 72 approval.

If so, what types of alterations might require Section 72 approval, and what types should be considered routine maintenance, not requiring such approval?

NEP proposes that the Department, in its discretion, adopt a rule of reason for defining when a Section 72 approval is required for alterations to transmission lines. We respectfully propose that alterations that do not change the width or height of structures on the line by more than 20% do not rise to “substantial” alterations. NEP furthermore refers the Department to the Massachusetts Environmental Policy Act¹² (MEPA) regulations at 301 CMR 11.00, which define “Routine Maintenance” as:

“Any maintenance work or activity carried out on a regular or periodic basis in a manner that has no potential for Damage to the Environment or for which performance standards have been developed that avoid, minimize, or mitigate potential environmental impacts to the maximum extent practicable.”

Projects that fall within the definition of “Routine Maintenance” are exempt from Environmental Notification Form (ENF) filing under MEPA. NEP proposes that language similar to the MEPA regulations’ definition of “Routine Maintenance” could

¹² M.G.L. c. 30 § 61 *et seq.*

also serve as a foundation for guidelines for determining whether alterations to transmission lines require Section 72 review.

2. For transmission providers: Have you ever sought Section 72 approval for alterations to an existing transmission line, except in the context of an eminent domain filing?

Yes.

If so, please provide recent examples.

In 1996, NEP sought Section 72 approval for upgrades to two 69kV substation tap lines located in Uxbridge, Massachusetts. The tap lines were over one mile in length and upgrades consisted of increasing the voltage on both lines from 69kV to 115kV. Under NEP's current proposal, such lines would be exempt from Section 72 review because they are substation tap lines that do not expressly fall within the statutory definition of transmission lines pursuant to Section 1 or Section 72 of Chapter 164.

What factors do you consider when deciding whether to seek such approval?

The primary determination is whether the project rises to the level of "substantial" alterations in light of the BEC decision. Given the vagaries of that term, NEP proposes a "20% test", as described above.

3. For transmission providers: Approximately how many additional Section 72 filings would you make annually if Section 72 approval were required for all reconductoring of electric transmission lines?

On an annual basis, NEP would make approximately three (3) additional Section 72 filings for this purpose.

For reconductoring that required the replacement or relocations of a significant number of poles?

NEP would make approximately three (3) additional Section 72 filings for this purpose.

For reconductoring that required replacement or relocation of all poles?

NEP would make approximately one (1) additional Section 72 filing for this purpose.

For the relocation of a transmission line outside of the existing right-of-way?

NEP would likely make no additional Section 72 filings for this purpose, as such a project is atypical for NEP's system.

III. Scope of Section 72 Proceeding

1. Attached to this Request for Comments is a draft checklist, similar to the checklist used for zoning exemptions, which outlines the information that should be submitted as part of a Section 72 filing. Does the checklist accurately convey the scope of current Department proceedings with respect to Section 72 reviews?

Yes.

Would you recommend any changes to the current scope of the Section 72 review?

The National Grid companies do not believe that the current scope of Section 72 review should or is required to include an *extensive* investigation into alternatives to a particular transmission line project or an *extensive* environmental review. Although some review of these topics may be appropriate for a determination of public convenience and

public interest, they are not mandated in Section 72 as they are in Section 69H, which governs EFSB decisions.¹³

2. There have been differences of opinion in the past as to whether G.L. c. 164 § 72 requires that a company seek Department approval to construct any new transmission line, or whether the Department’s approval is necessary only when an eminent domain taking is necessary for such construction. Given the Court’s holdings in Sudbury and BECo, and the amendments to G.L. c. 164 § 72 adopted as part of Chapter 249 of the Acts of 2004, is it still possible to argue that the Department’s approval should be required only when an eminent domain taking is necessary for the construction of a transmission line?

No. In the absence of any legislative change to Section 72 which would override the Sudbury and BECo decisions, the National Grid companies would not make this argument.

¹³ Most – if not all – of the National Grid companies’ linear projects in Massachusetts involve environmental review by a local conservation commission. Some projects also trigger an ENF filing under MEPA and/or environmental review by the U.S. Army Corps of Engineers. Aside from wetlands and water quality reviews, the characteristics of a project’s *situs* may trigger rare and/or endangered species reviews by the Natural Heritage Program of the state Department of Fish & Wildlife.

Conclusion

The National Grid companies support the adoption of clear thresholds and reasonable guidelines for determining when a linear project's proponent must or may seek Section 72 approval. In summary, we propose the following:

- Section 72 should be applied to linear projects that meet the statutory definition of "transmission" (i.e., designed to operate at 69 kV or above);
- Section 72 approval should be available for lower voltage and tap lines that require a taking of private property to effectuate the project.
- Section 72 should not be required for alteration projects that do not increase height or width of structures by more than 20%.
- Section 72 should not be required for routine maintenance projects.

The National Grid companies also support the convening of a technical session to discuss the issues at play in this investigation by the Department. We furthermore suggest that another round of comments may be appropriate and useful, following such a technical session.

Respectfully submitted,

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